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IN THE

Supreme Court of the United States

TAHOE-SIERRA PRESERVATION COUNCIL, INC.,
Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION, CALIFORNIA FARM BUREAU FEDERATION AND THE NEVADA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION, CALIFORNIA FARM BUREAU FEDERATION AND THE NEVADA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

With the joint written consent of the parties given and filed with the Clerk of the Court, the American Farm Bureau Federation, California Farm Bureau Federation, and the Nevada Farm Bureau Federation respectfully submit this brief as *amici curiae*.[1]

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[1] Counsel for *amici curiae* have authored this brief in whole and no other person or entity other than *amici*, their members or counsel have made a monetary contribution to the preparation or submissions of the brief.

INTEREST OF THE AMICI CURIAE

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 5 million member families. *Amici* California Farm Bureau Federation and Nevada Farm Bureau Federation are constituent members of AFBF, representing the interests of farmers and ranchers in the States of California and Nevada, where the property at issue in this case is located.

Amici American Farm Bureau Federation, California Farm Bureau Federation and the Nevada Farm Bureau Federation have a direct stake in the outcome of this case. The decision of the U.S. Circuit Court for the Ninth Circuit in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 216 F.3d 764 (9th Cir. 2000) ignores, if not attempts to reverse,[2] this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), which held that a temporary regulatory taking of private property requires compensation under the Fifth Amendment Takings Clause.

Amici's farmer and rancher members own and lease significant amounts of land on which they depend for their livelihoods and upon which all Americans rely for food and

[2] A Petition for Rehearing was denied along with a suggestion for Rehearing En Banc on October 20, 2000. Five Circuit Judges dissented on the grounds that the panel opinion was in direct conflict with the decision of this Court in *First English.* As the dissent authored by Judge Kozinski notes, "The panel does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English* . . . ." 228 F.3d at 999.

other basic necessities. Because that land is subject to increasingly onerous regulation from all levels of government that impair the ability to farm, and, in some instances, eliminate that ability altogether, AFBF and its members are vitally interested in the legal rules establishing the availability of compensation under the Takings Clause. Accordingly, AFBF, often together with one or more of its member state Farm Bureaus, has participated as *amicus* in this Court in support of landowners in takings cases such as *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes, Ltd*, 526 U.S. 687 (1999), and *Palazzolo v. Rhode Island*, 533 U.S. ___ (2001), as well as in cases concerning the permissible scope of land use regulation such as *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

In recent times, federal, state and local governments experienced monumental budget problems. In the face of diminishing program funds, federal, state and local regulators began to satisfy their public purpose land needs, particularly those for environmental protection and restoration, through regulatory controls, procedures, and other means that attempt to avoid compensatory expenditures. The remote and sparsely developed lands of farmers and ranchers have been particularly vulnerable to such taking efforts. The creative efforts of government regulators to restrict farmers and ranchers in the economically viable use of their land without just compensation continues today, particularly in the areas of wetland preservation and endangered species habitat protection.

American farmers and ranchers need the protection of the Fifth Amendment and the federal courts if they are to find economically feasible ways to use their land and remain in

the agricultural business. They began to sense some relief and assurance of their ability to remain viable when this Court, in *Dolan*, sent a strong signal that the constitutional tide was turning in favor of private property rights. As Chief Justice Rehnquist declared in the majority opinion, "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation." 512 U.S. at 2320. *Dolan* followed a recent trend of rulings strengthening the position of property owners under the takings clause of the Fifth Amendment in the face of increased government regulation, particularly in the area of environmental protection and restoration. That trend began in 1987 with this Court's decision in *First English*.

Amici AFBF, California Farm Bureau Federation and Nevada Farm Bureau Federation have a vital interest in this Court reversing the decision of the Ninth Circuit and affirming that *all* takings—permanent or temporary, require compensation.

BACKGROUND

This case involves approximately 450 owners of residentially zoned and improved lots near Lake Tahoe who sued for compensation when the Tahoe Regional Planning Agency (TRPA), through a rolling series of moratoriums and ordinances, blocked them from building homes on their lands as part of an regulatory scheme to protect the water quality of the lake. At issue on this appeal is a moratorium on development that required the landowners to leave their land idle for almost three years.[3] After a bench trial, the district

[3] The moratorium at issue is but one in a series of rolling moratoriums and ordinances over the last twenty years that still block the landowner-petitioners from building on their properties; the same absolute prohibitions on development that this Court reviewed in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997).

court, following the takings jurisprudence of this Court set forth in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), held that the landowners were entitled to compensation for the three year period. The Ninth Circuit reversed, holding that a planning moratorium or temporary regulation can not result in a compensable taking. The Ninth Circuit refused to follow the decision of the majority of this Court in *First English*. As noted by Judge Kozinski in his dissent from the order denying rehearing, the Ninth Circuit chose instead to rewrite Supreme Court precedent. 228 F.3d 998, at 999.

ARGUMENT

Amici's position in this appeal is straightforward and the same as the landowner-petitioners. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court held that a taking occurs when a land use regulation prevents all economically beneficial or productive use of property. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this Court held that there is no difference between a temporary taking and a permanent taking. Seemingly, this Court could not have made itself more clear on the matter that the constitutional guarantees of the Fifth Amendment Takings Clause protect against all uncompensated takings—even where the public use behind the regulation is for environmental protection and is temporary.

For the framers of our Constitution, private property supplied the "clear, compelling, even defining instance of the limits that private rights place on legitimate government." J. Nedelsky, *Private Property and the Limits of American Constitutionalism 9* (1990). The Framers understood the protection of property rights—rights in land in particular—as "the first object of government." *The Federalist No. 10*, at 78 (James Madison) (C. Rossiter ed., 1961).

The Takings Clause lies at the heart of the constitutional scheme to protect private property rights from the grasp of transient political majorities; it was carefully crafted "to bar Government from forcing some people alone to bear burdens which, in all fairness, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Although the Constitution grants government the power to deprive a person of property for a public purpose, the exercise of that power is strictly conditioned upon the payment of just compensation.

To permit governments to deprive private citizens of their property without compensation simply to "advance legitimate state interests" would strip the Takings Clause of its central purpose of preventing redistribution of private property by transient political majorities. It is indisputable that "such a justification can be formulated in practically every case." *Lucas*, 505 U.S. 1003, 1025 n. 12 (1992); see also *Keyston Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 513 (1987) (Rehnquist, C.J., dissenting) ("nearly every action the government takes can be characterized as preventing some grave public harm"). As a practical matter, scrutiny of government action to see if it is rationally related to a legitimate state interest is tantamount to no scrutiny at all. Justice Holmes warned of this result in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922):

> When th[e] seemingly absolute protection [of the Just Compensation Clause] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The text, history and central constitutional role of the Takings Clause demand much more exacting scrutiny of land-use regulations. That provision unambiguously states that "private property [shall not] be taken for public use, without just compensation." For the common good, government may deprive a person of property, but only upon payment of just compensation. To hold that the requirement of just compensation does not apply where a taking serves a legitimate public purpose would effectively repeal the Takings Clause, for that Clause presumes that the government is taking property "for a public purpose."

The history of the Takings Clause confirms that it is suppose to have more teeth. The payment of compensation when government took property for the common good was "a principle of the common law * * * of immemorial usage" (W. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 533, 583 (1972), and continued "protection of private property was a nearly unanimous intention among the founding generation." M McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Cal. L. Rev. 267, 270 (1988). See generally J. Story, *Commentaries on the Constitution of the United States* 510-511 (R. Rotunda & J. Nowak eds. 1987). There is no indication that the Framers thought a broad swathe cut through the middle of this principle entitled government to take property without compensation where it could conjure up some arguments that the exaction was "reasonable." To the contrary, the Framers regarded protection of the individual property rights as a central goal of government. "Government," wrote James Madison, "is instituted no less for the protection of the property than of the persons of individuals." *The Federalist* No 54, at 339 (C. Rossiter ed. 1961).

The Takings Clause disciplines government by forcing it to weigh the benefits to the community of depriving a person of his property against the constitutionally mandated compensation that would have to be paid for the taking. Property can always be taken for the common good, provided the government is willing to pay the bill. Hence the distrust

of government underlying our constitutional structure of separated powers and checks and balances and our Bill of Rights can clearly be seen at work in the Takings Clause, which imposes a taxpayer burden to check excessive zeal of regulatory bodies. The takings clause, moreover, requires the government treat individuals with dignity by ensuring that, if government takes their property, it compensates them for that intrusion.

Finding "'no warrant in the laws or practices of our ancestors'" for government "'authority [to] inva[de] private right under the pretext of the public good'" (*United States v. Lynah*, 188 U.S. 445, 470 (1903), this Court has long recognized that the Takings Clause is designed to shield individual rights from government action that would convert one person's property to community use. See *Armstrong*, 364 U.S. at 49; *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (the Clause "prevents the public from loading upon one individual more than his just share of the burdens of government"). The teachings of the Takings Clause is that where public benefits are achieved by depriving individuals of property, the costs "must be borne by all [of a community's] taxpayers [and not] imposed entirely on the owners of individual properties." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 139 (1978) (Rehnquist, J., dissenting). The cardinal principle that should guide its interpretation is that government may not sacrifice the interests of some to benefit others: "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 2600 U.S. at 416; see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-842 (1987).

THE FIFTH AMENDMENT GUARANTEES THAT ALL TAKINGS, REGARDLESS OF THEIR LENGTH, WILL BE COMPENSATED

In 1987 this Court issued its landmark decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). The Court held that the Fifth Amendment means exactly what it says: the government must compensate the owners of private property taken for public purposes. The Court concluded that the Fifth Amendment dealt with all takings, regulatory as well as physical, and, critical to this case, temporary as well as permanent.

Applying *First English,* the district court in *Tahoe-Sierra* found there to be a compensable taking. On appeal, the Ninth Circuit, chose to ignore this Court's *First English* pronouncements. The Ninth Circuit ruled that a temporary regulation can never be a regulatory taking. Rather than dealing with the landowners' constitutional guarantees, the Ninth Circuit engaged in a rescue operation to shield regulators from shouldering the financial consequences of their actions. It actually saw the landowners' pursuit of their constitutional guarantees under the Takings Clause as an effort to "penalize" the regulators and the regulatory process. The Ninth Circuit viewed the landowners as those who would turn the Takings Clause "into a weapon to be used indiscriminately to penalize local communities for attempting to protect the public interest." 216 F.3d at 782.

But the Takings Clause and takings litigation are not about penalizing regulators. Instead, the Takings Clause disciplines regulators by forcing them to weigh the benefits to the community of depriving a person of his property against the constitutionally mandated compensation that would have to be paid for the taking. Takings litigation accepts the general validity of the regulation, it does not seek to strike it down. Takings litigation is only another instance of "protect[ing] the public interest" by requiring obedience to the Constitution.

As Justice Brennan put it, "After all, if a policeman must know the Constitution, then why not a planner?" See *San Diego Gas*, 450 U.S. 621, 661, n.26 (1981) (dissenting).

Most land-use regulations do not result in a taking and do not call for compensation. A regulation effects a taking only when it denies an owner of "all economically beneficial or productive use of land." *Lucas,* 505 U.S. 1003, 1015 (1992). As indicated by Judge Kozinski in his dissent, "The only difference between this case and *Lucas* is that the regulation here had a finite duration . . . So the question is whether there is something special about a finite moratorium that relieves the government from its duty to compensate." *Tahoe-Sierra*, 228 F.3d 998, 999-1000. And, of course, this Court had answered that question in *First English*, when it said that "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English*, 482 U.S. 304, 318 (1987).

Thus, the Ninth Circuit got it wrong in *Tahoe-Sierra.* The Fifth Amendment means exactly what it says: "private property [shall not] be taken for public use, without just compensation." That means all takings, regardless of their length, purpose, or manner of implementation.

THE NINTH CIRCUIT'S DECISION HAS SEVERE, WIDE REACHING IMPLICATIONS FOR LANDOWNERS

This Court's landmark decision in *First English* concluded that the Fifth Amendment not only dealt with physical takings, but also regulatory takings, and, critical to *amici*, temporary as well as permanent regulatory takings, including planning moratoriums. The matter of temporary takings is of great practical importance to landowners, farmers and ranchers especially, because many takings are only temporary in nature. For example, the wetlands restrictions that were set

aside by this Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) were "temporary" since they have now been struck down; development moratoria are commonplace while rezoning issues are being considered by government; long delays in making decisions on permit applications, such as Clean Water Act Section 404 permits to fill wetlands, are, in effect, "temporary" restrictions on the use of land; and Endangered Species Act habitat restrictions may be "temporary" to the extent that a protected species of plant or animal continues to exist on private property thus preventing its use for any purpose. If federal, state and local governments can freely restrict land use without paying compensation, so long as the regulatory restriction is "temporary," landowners, especially farmers and ranchers, can expect to see a lot more use of planning delays, rolling moratoria, and "temporary " regulations impairing their economical viable use of their lands.

CONCLUSION

For the foregoing reasons, the decision of the U.S. Court of Appeals for the Ninth Circuit should be reversed.

Respectfully Submitted,

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